INDEX.

Table of Cases.

Index.

IN THE

Supreme Court of the United States

No. 249.

THE YOUNG MEN'S CHRISTIAN ASSOCIATION OF COLUMBUS, OHIO, THE YOUNG WOMEN'S CHRISTIAN ASSOCIATION OF COLUMBUS, OHIO, BEREA COLLEGE AND THE AMERICAN MISSIONARY ASSOCIATION,

Petitioners,

vs.

ORA DAVIS, ET AL.,

Respondents.

BRIEF OF RESPONDENTS.

The Federal Estate Tax Law Imposes Upon the Executor the Primary Duty of Paying the Tax. It Does not Provide Where the Ultimate Burden of the Tax Shall Rest as Between the Beneficiaries of the Estate. That Question is to be Determined by the Will and the Law of the State as Construed by the State Court.

The federal estate tax law (as amended 1918), taxing the transfer of a decedent's estate, imposes the tax upon

the executor, to be paid by him "out of the estate before its distribution." It is an estate tax as distinguished from the inheritance tax under the federal law of 1898 and under the inheritance tax laws of many of the states, which tax the receipt of the estate and impose the duty on the particular legacies or distributive shares and not on the whole estate transferred.

The executor of the will in question in this case, computed the tax and paid it as required by the law. There is no dispute in this case over the amount of the tax or over the duty of the executor to pay it. It was a charge against the estate which the executor was required to pay by the federal law, and also by the law of the state. (General Code of Ohio, §10714, **infra.**)

The executor brought this action in the Common Pleas Court of Franklin county, Ohio, under authority of the state statute (G. C. §10857) which follows the equity practice of permitting an executor to ask the direction and judgment of the court in any matter respecting the estate and property to be administered and the rights of the parties in interest. Among other inquiries, the executor asked whether he should charge the amount of this tax to the several beneficiaries of specific devises and legacies or deduct it, like other charges against the estate, in determining the "rest, residue and remainder" of the estate bequeathed to the residuary legatees. In other words, shall the executor charge the amount of this tax to the beneficiaries of the specific devises and legacies or charge it against the residuary legatees.

As "the right to regulate succession is vested in the

states and not in Congress" (**Knowlton v. Moore**, 178 U. S., 58; **Edwards v. Slocum**, 287 Fed., 651), the court must look to the will and the law of Ohio for the answer to this question.

The federal estate tax law stops at the provision that the executor shall pay the tax out of the estate before distribution. It does not undertake or pretend to say where the executor shall charge or collect the amount of the tax he has paid out of the estate. Congress has not assumed any jurisdiction further than to require the tax to be paid by the executor out of the estate. The tax being assessed by Congress against the executor upon the estate in his hands and made a lien on all the property of the estate except that part used for payment of charges against the estate (Sec. 409), it is for the state law and the will to determine against whom the amount of the tax shall be charged in adjudging how the estate shall be distributed among the devisees and legatees. The testatrix (the law of the state permitting) may direct where the amount of the tax shall be charged or in the absence of any such direction in the will, the state law controls the court in deciding whether this charge against the estate shall be charged against the residuary legatees or specific legatees. The will might provide, or, in absence of such provision in the will, the law of the state might provide that all such taxes shall be charged against the residuary legatees in determining "the rest, residue and remainder" of the estate, or might provide that the amount of all such taxes shall be charged to and collected from the specific devisees and legatees in

the proportions of the values of their several specific devises and legacies and not deducted, like other charges against the estate, in determining the rest, residue and remainder.

The will first provides that "all my just debts and funeral expenses shall be paid." We assume that "my just debts" includes all charges and taxes, although they may have accrued after the death of the testatrix and therefore were not strictly her debts. If that assumption is unwarranted, then the statute of Ohio (Gen. Code, §10714) applies and it provides:

> "Every executor or administrator shall proceed with diligence to pay the debts of the deceased, applying the assets in the following order:
>
> 1. The funeral expenses, those of the last sickness, and the expenses of administration;
>
> 2. The allowance made to the widow and the children for their support for twelve months;
>
> 3. Debts entitled to a preference under the laws of the United States;
>
> 4. Public rates and taxes, and sums due the state for duties on sales at auction;
>
> 5. To every person who performed manual labor in the service of the deceased, before payment of the general creditors, the full amount of wages due to such person for such labor performed within twelve months preceding the decedent's death, not exceeding one hundred and fifty dollars;
>
> 6. Debts due to all other persons."

The will then makes several devises and bequests of specific real estate and specific sums of money and specific personal property to certain of the testatrix's rela-

tives and friends, and in Item X bequeaths "All the rest, residue and remainder of my estate and property, real, personal and mixed," etc., to the petitioners. The Supreme Court of Ohio, in this case, has placed its construction on this will and on the law of Ohio regulating the distribution of decedents' estates, a jurisdiction exclusively in the state court. That court has declared that charges imposed by law must first be paid out of the estate as a whole before payment of charges imposed upon the estate by will; that under such a will a residuary legatee is in the position of a last lienholder after all prior, lawful claims and charges have been satisfied out of the estate and that "all the rest, residue and remainder of my estate," etc., "affords a clear and conclusive presumption that all charges imposed by the law or by the testator should be paid out of the estate before any right should ripen in behalf of the residuary devisees or legatees."

That is the judgment of the Ohio court construing this will and construing the law of Ohio. That is the direction of the court to the executor, based upon the court's construction of the will and the court's construction of the law of the state. The estate tax, being a charge against the executor and paid by him, the state court has determined that, under its construction of the will and of the law of the state, the executor should charge it against the residuary legatees in arriving at the "rest, residue and remainder" of the estate. The jurisdiction to construe the will and apply the law of the state is exclusively in the state court. The Supreme Court of the United

States would not reverse the judgment of the Supreme Court of the state on the grounds that the state court erred in construing the will or in construing the law of the state, as, for instance, if the United States court should be of opinion that the testatrix intended that charges and debts against the estate should be taken from the shares of specific legatees and not from residuary legatees, or that the law of the state requires all charges to be taken out of the shares of specific legatees.

Congress, having charged the tax against the executor, "to be paid out of the estate before its distribution" and made the tax a lien "upon the gross estate" except the part "used for the payment of charges against the estate and of its administration," properly left the ultimate burden of the tax to be determined by will, or, in absence of a will, by the state law, in recognition of the exclusive authority of the state to say where the burden of the tax shall rest. The provision that the tax shall be paid out of the estate before distribution is qualified by the words "unless otherwise directed by the will," thus recognizing the right of the testatrix, and therefore the authority of the state law which alone can control the right of the testatrix, to determine the legatees and devisees from whose shares the tax shall be taken. This involves no conflict of laws or jurisdictions, but is a recognition by the state of the right of Congress to tax and a recognition by Congress of the right of the state to control the distribution of estates.

As stated in **Plunkett v. Old Colony Trust Co.**, 124 N. E., 265 (Mass., 1919), cited and followed in **Taylor v.**

Jones, 136 N. E., 382 (Mass., 1922), where the federal estate tax was under consideration, "Since neither the act of Congress nor the will and codicils make any other provision for the point of ultimate incidence of this tax, it must rest on the residue of the estate," and in **Re Newton's Estate**, 74 Pa. Sup. Ct. Rep., 361, "After the payment of the proper expenses against the estate, the tax imposed by this statute is an exaction of the sovereign to be taken out of the net estate, and the will, or in case of intestacy, **the law of the jurisdiction, comes into operation** upon what remains for distribution. The burden of such tax must therefore be borne by the residuary legatees."

As stated by Hough, C. J., in **Edwards v. Slocum**:

> "So far as the words of this statute are concerned the United States does not care who ultimately bear the weight of this tax; it announces the sum and demands payment from the executors; if the legatees and devisees cannot agree as to the burden bearing, the state courts can settle the matter."

It is significant that in none of the numerous cases in which residuary and specific legatees have disputed in the state courts over the question as to who should pay the federal estate tax no one has appealed to the Federal courts upon the pretext that a federal question is involved.

What is the "Rest, Residue and Remainder of the Estate?"

If this court is to render its judgment on what is the rest, residue and remainder of the estate within the meaning of the will and laws of Ohio, regardless of the judgment of the Ohio court, then we maintain here, as we did in the state court, that a residuary legatee does not stand on an equal footing with specific legatees and devisees.

The benefaction conferred by a residuary bequest is only that which remains after charges, cost of administration and the specific legacies and devises have been paid in full. The residuary legatee is the "person whose interest in the estate of the decedent * * * is subject to * * * prior liability for the payment of taxes, debts or other charges against the estate" within the meaning of Section 408 of the estate tax law. The residuary legatee, therefore, is the person from whose interest the tax must be paid or against whose interest the executor must charge the tax paid by him.

It is the general rule of law that, failing a testamentary provision to the contrary, debts, charges and all just obligations upon the estate must result in the reduction of the residue of the estate. The general laws of administration in all jurisdictions provide for the order in which property shall be resorted to for the payment of debts and charges against an estate. In Ohio, **Section 10714, General Code, supra**, directs the order in which charges and debts against the estate shall be paid. The

residuary legatees can take only the residue of the estate after the costs, charges, debts and specific legacies are paid. That residue necessarily must be precisely the same whether the legatee who receives it is a charitable institution or the recipient of property on which the tax has been paid within the last five years, or of property represented by the $50,000.00 deduction, or any other legatee.

The authorities hold that the federal estate tax is a charge against the estate, that the residue of the estate is found after deducting this and all other charges against the estate and that therefore the ultimate burden of the tax must rest upon the residuary legatees.

The act of 1917 provided that the amount of charges against the estate and $50,000.00 should be deducted, in finding the value of the net estate for the purpose of the tax. The 1918 amendment authorized the additional deductions of an amount equal to the value of any property of the decedent on which this tax had been paid within the last five years, and the amount of certain bequests, among which were those to educational and charitable institutions. Petitioners are such institutions and counsel for petitioners contend that as the authorities had under consideration the act prior to the 1918 amendment, they have no application to this case. We maintain that the question in this case, under the amended act of 1918, is the same as under the act prior to the amendment. In the cases which we shall cite there was no dispute as to whose interest should be burdened with the tax on the value of the residuary estate. The residuary legatees

conceded that the tax on the value of the residuary estate should come out of the residuary estate, but they contended that they should not be burdened with the tax on the value of that part of the estate transferred to the specific legatees—precisely the same contention made by the petitioners in this case. There is no dispute here as to whose interests shall be burdened with the tax on the value of the property going to the residuary legatees. There is no such burden for there is no tax computed on that value. The petitioners contend that as they do not receive the part of the estate making up the value upon which the law computes the tax, it is unjust that they should be compelled to pay the tax. They urge here, just as the residuary legatees urged in the cases under the 1917 act, that those who receive the specific legacies should pay the tax computed on the value of those legacies and that this is the implied intention of Congress.

The principle in this case is the same as in the cases under the 1917 act, that the tax is charged against the executor and the estate in his hands and paid by him and therefore comes off of the residuary estate. The rest, residue and remainder of the estate must be the same irrespective of the character of the residuary legatees. What is left after paying charges against the estate and specific legacies, is the rest of the estate, whether it goes to a charitable institution under the act of 1918 or the act of 1917, or whether it goes to a charitable institution or an individual under the act of 1918.

The Following Authorities Hold that the Burden of the Federal Estate Tax Rests Upon the Residue:

The clear distinction between an estate tax and a legacy tax is demonstrated in the history of such taxation outlined by Mr. Justice White in **Knowlton v. Moore**, 178 U. S., 41. Quoting from Hanson's Death Duties, he says:

> " 'Historically, probate duty is the oldest form of death duty, having been established in 1694.' The probate duty thus referred to was 'a fixed tax dependent upon the sum of the personal estate within the jurisdiction of the probate court, payable on the grant of letters of probate, by means of stamp duties **and was treated as an expense of administration to be deducted out of the residue of the estate.**' " (p. 48.)

Art. I of Regulation No. 37 (Revised) of the Internal Revenue Department is as follows:

> "The Federal Estate tax is imposed upon the transfer of the net estate, determined in the manner prescribed, of every person dying after September 8, 1916. The tax is not laid upon the property, but upon its transfer from the decedent to others. The subject of the tax is the transfer of the entire net estate, not any particular legacy, devise or distribution thereof. It is not an individual inheritance tax. The value of the separate interests and the relationship of the beneficiary to the decedent, have no bearing upon the question of liability or the extent thereof. The transfer of the property is taxable, although it escheats to the state for lack of heirs."

In **United States v. Woodward**, 256 U. S., 632, Mr. Justice Vandevanter, referring to the federal estate tax, said (p. 635):

> "It is made a charge on the estate and is to be paid out of it by the administrator or executor substantially as other taxes and charges are paid. * * * It does not segregate any part of the estate from the rest and keep it from passing to the administrator or executor for the purposes of administration, as counsel contend, but is made a general charge on the gross estate and is to be paid in money out of any available funds, or if there be none, by converting other property into money for the purpose."

In **Thurber's Federal Estate Tax (Sec. 223)** it is said:

> "Two purposes appear: (a) the general purpose that the tax shall be paid before the distribution of the estate **(in which case, if there is a will, the burden falls upon the residuary legatee)**; and (b) that if not so paid no particular beneficiary or class of beneficiaries shall pay more than his or their proportion of the tax."

In **Taylor v. Jones, 136 N. E. 382** (Mass. 1922) it is said:

> "The tax imposed by act Cong. Sept. 8, 1916, c. 463, par. 201, as amended (U. S. Comp. St., par. 6336½b) is an estate tax and not a legacy or succession tax, and must be paid out of the residue of the estate when no provision is made by the will for its payment."

In **Hamlin v. Wellington**, 124 N. E., 4; 226 N. Y., 407; (1919), the testatrix made specific bequests, and then gave the residue of the estate to certain residuary legatees. The executor deducted a proportionate amount of the federal estate tax from each legacy. The specific

legatees objected to this deduction, maintaining that the entire tax should come out of the residuary estate. The court held that the federal act created an "estate tax" as distinguished from an "inheritance tax" and that the entire tax was payable from the estate and no part chargeable to the specific legatees. The court say:

> "Had the congress desired to provide for an apportionment of a tax amongst the legatees, it might readily have used language adopted by that body in 1901 (U. S. Statutes at Large, Vol. 31, c. 806, Sec. 11) when it amended Section 30 of the act of 1898 reviewed in the **Knowlton Case, Infra,** by adding thereto 'Any tax paid under the provisions of Sections twenty-nine and thirty shall be deducted from the particular legacy or distributive share on account of which the same is charged' or as provided in our statute that the executor shall deduct the tax on a legacy or distributive share." (p. 7.)

In **Plunkett v. Old Colony Trust Co.,** 124 N. E. 265 (Mass. 1919), followed in **Taylor v. Jones, supra, Rugg, C. J.,** stated the question as follows (p. 265):

> "This petition by the executors is brought to determine whether the federal tax which has been paid should be charged entirely against the residuary estate or apportioned pro rata among all the devisees and legatees."

After distinguishing this as an estate tax and not as a legacy or succession tax, and stating that the will contained no direction respecting the payment of the tax, he said (p. 267):

> "So far as any inference may be drawn, it would seem to be that taxes were intended to fall where the law placed them. It is not permissible for us

to speculate as to the existence of an intent to make a different provision from that provided by law in the absence of any expression of testamentary purpose on the subject. It is the general rule that, failing any testamentary provision to the contrary, debts, charges and all just obligations upon an estate must be paid out of the residue of an estate. The benefaction conferred by the residuary clause of a will is only that which remains after all paramount claims upon the estate of the testator are satisfied. **Tomlinson v. Burry,** 145 Mass., 346, 11 N. E., 137; 1 Am. St. Rep., 464. The tax is a pecuniary burden or imposition laid upon the estate. **Boston v. Turner,** 201 Mass., 190, 87 N. E., 634. In its nature it is superior to the claims of the residuary legatee. Since neither the act of congress nor the will and codicils make any other provision for the point of ultimate incidence of this tax, it must rest on the residue of the estate. **Matter of Hamlin,** 226 N. Y., 407."

In **re Roebling's Estate,** 104 Atl., 295, (N. J., 1918), the question was whether the federal estate tax should be deducted in computing the state inheritance tax. The court say (p. 296):

"The concluding words of Section 208 (U. S. Comp. St., 1916, Sec. 6336½i), 'It being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution,' are unmistakable in their purport that the death duty is imposed upon the estate and payable out of the residue. To be more precise, it is imposed upon the estate transferred by death, not upon the succession resulting from death. The distinction is well defined and recognized in countries where both kinds of tax exist. The federal tax resembles the probate duty of act July 1, 1862, c. 119, 12 U. S. Stat., p. 483, which was payable by the executor out of the estate, while the legacy duty therein provided

for (p. 485) was payable by the beneficiaries. The tax occupies the same field of death duty as does the 'estate tax' in England."

In **People v. Passfield**, 120 N. E., 286 (284 Ill., 450, 1918), the same question was considered, that is, whether the federal tax is deductible in computing the tax under the state inheritance tax law. The court said, **page 288**:

"As the duty is made payable by the executor or administrator to the collector or deputy collector by the express provisions of the statute, the duty is an expense or a charge against the estate of the decedent, and not an express charge against the shares of the legatees or distributees of the decedent. The legatees and distributees cannot in any sense be held to have 'received' any part of the duty that is paid to the government by the executor or trustee or administrator as such estate tax, and there is no language in the act that will permit a construction that the duty is levied upon each share of the legatees or distributees of the decedent, as was given the federal act of 1898 by the court in **Knowlton v. Moore, supra.**"

In **re Newton's Estate**, 74 Pa. Sup. Ct. Rep., 361, the court said (Syl.):

"After the payment of the proper expenses against the estate, the tax imposed by this statute is an exaction by the sovereign to be taken out of the net estate, and the will, or in case of intestacy, the law of the jurisdiction, comes into operation upon what remains for distribution. The burden of such tax must therefore be borne by the residuary legatees."

After an illuminating detailed review of the federal statute, in the opinion, it is stated:

> "It is a tax upon the interest which ceased by reason of the death of the person whose property it was. The will of Lillie G. Newton contained no direction that the burden of the tax should be borne by any particular legatee or class of legatees. It follows, therefore, that the tax must be paid out of the general funds of the estate. It is the general rule that failing in testamentary provision to the contrary, debts, charges and all just obligations upon an estate must result in a reduction of the interest of the residue of that estate. The benefaction conferred by the residuary clause of a will is only of that which remains after the specific and general pecuniary legacies have been satisfied. The burden of the tax must in this case be borne by the residuary legatees." (p. 372.)

Bullard v. Redwood Library, 91 Atl., 30 (R. I. 1914), while not involving a federal tax, is instructive on the contention of counsel for petitioners that only that part of the estate which gives rise to the tax should bear the burden of the tax. In that case the testatrix was a resident of Rhode Island, but some of the personal property bequeathed was in Massachusetts, and therefore subject to the inheritance tax laws of Massachusetts. The executors paid the tax, and it was contended that the legatees who received the personal property so made the subject of the tax in Massachusetts should be charged with the tax, seeing that it was their property, and not the property of other legatees which made it necessary for the executor to pay this tax.

The court held:

"1. In the construction of a will, giving legacies of personal property situated in and subject to the inheritance tax laws of another state, the question whether such tax shall be charged against the legacies given or not is one of the testator's intent, in view of all the circumstances.

"2. Personal property has no locality, but is sold, transmitted, bequeathed by will, and descendable by inheritance according to the law of the owner's domicile, and not according to the law of the situs.

"3. A testator, domiciled in the state of Rhode Island, is presumed to have made his will in accordance with the existing laws of such state.

"4. Testatrix died domiciled in this state, and her will was probated and her executors appointed by a probate court of this state. She left personal property in Massachusetts, to get possession of which her executors were obliged to take out ancillary letters testamentary in Massachusetts, and to pay inheritance taxes assessed against certain legacies. **Held,** that as the taxes were merely a charge on the particular property because of the jurisdiction of Massachusetts over it by reason of its situs therein, and not on the legacies given by the will, and as such foreign tax law could not regulate the exercise of testamentary power by a domiciled resident of this state, the amount of the tax was not a charge against the pecuniary legacies, but a part of the expenses of administration chargeable against the general estate.

"6. A gift of a 'residue' is subject to the precedent claims upon the estate, it is a gift of what remains after the debts and legacies are paid."

In **Hazard vs. Bliss**, 113 Atl., 469 (R. I., 1921), the case of **Bullard vs. Redwood Library, supra**, was reviewed, and it was held:

> "4. For the purpose of assessing state inheritance taxes, under inheritance tax act of 1916, that portion of the assets of the estate which the executor used to pay federal estate tax, under a federal estate tax law (U. S. Comp. St., Sec. 6336½a-6336½m) is a part of the estate transferred from the testator, and must be considered as having been transferred to the residuary legatee.
>
> "5. In the absence of a testamentary provision to the contrary, all charges against an estate of a decedent fall upon the residue and reduce the amount of the residuary legacy, and if the estate is sufficient to pay the other legacies and the charges against the estate, the question of the reduction of such legacies by the payment of a federal tax does not arise."

In **Dexter v. Jackson**, 140 N. E., 267 (Mass., May 1923), it was held:

> "Under Revenue Act U. S. 1918, Secs. 401, 407, 408, the estate itself must bear the burden of the estate tax, and it must be paid out of the residue, unless testamentary intention to the contrary is expressed."

De Courcy, J., said:

> "The federal estate tax is a tax on the net estate transferred by death and not on the particular devises, legacies or distributive shares * * * it is the estate itself which must bear the burden of the tax. * * * We find no intention expressed by the testatrix that the residue should be exonerated from the payment of the tax. * * * The general rule is that all expenses of administration are to be paid from the residue."

In **Edwards v. Slocum**, Hough, C. J., after stating that it was for the state courts to settle where the burden of the federal estate tax shall rest, and stating that it had been settled, so far as the Sage estate was concerned, by the Hamlin case (226 N. Y., 407), said:

> "And this tax is payable out of the whole estate as a paramount charge, which in effect casts it on, or takes it out of the residuary. **That the residuary estate is devoted to charity, etc., makes no difference.**"

In **Bemis vs. Converse**, 140 N. E., 686, 687, (Mass., July 1923), Rugg, C. J., said:

> "Courts cannot speculate concerning the intention of settlors and testators as to where they intend the burden of taxes to rest. The instrument as written must govern. Opportunity is freely open in framing trust deeds and wills to make full and accurate expression of desire and intention respecting the payment of taxes and the particular beneficiaries whose shares shall be exonerated from or bear that pecuniary exaction for the support of government. Specific provision on this point is familiar in wills and is not infrequently found in other instruments. In the absence of a definite declaration on the subject it must be presumed that the intention was that the ultimate weight of taxation must rest where the law places it. It cannot be presumed that anything else was intended than what is stated in the written instrument. It may be, for aught that now can be known, that the precise result which has happened was intended. There is no jurisdiction in equity to prescribe what may seem fairer than the settlor or testator has declared. To do that is as foreign to chancery principles as to remold a will in order to make it conform to different conceptions of justice or fairness from those indulged by the testator."

The "Net Estate" Comprises all the Property that is to be Transferred to all the Beneficiaries. The Law Makes Deductions in Determining the Value of the Transferred Estate for the Purpose of the Tax but not to Reduce the Amount of the Transferred Net Estate.

Counsel for petitioners claim that this case should not be governed by the universal rule that all debts and charges are payable out of the residuary estate. They claim that the 1918 amendment of the estate tax law has modified this rule. They predicate their argument on the assertion that "net estate" in the act means that portion of the estate and property after setting aside (1) that portion used to pay charges against the estate, (2) the property on which the tax has been paid within five years, (3) the property comprising the bequests to charitable institutions, and (4) $50,000.00 worth of property. Therefore they maintain that the residue of this estate bequeathed to the petitioners is not part of the "net estate."

The phrase "net estate" always has had a clear, unmistakable meaning in the law of administration of estates. It means the entire estate less the part used for the payment of debts and charges. The federal act does not change this meaning. It does not give the words "net estate" any new meaning.

As said by Hough, C. J., in **Edwards v. Slocum, supra:**

> "The phrase 'net estate' is not new but very old. It conveys the plain meaning of what is left for in-

> stant use; it is the clear or clean estate, a synonym usually suggestive of the original French word * * * for practical purposes it is the taxable estate."

Congress might have imposed a legacy tax on each legacy exceeding a certain amount. It might have exempted some legacies. It might have exempted legacies to certain relatives or charities and taxed all others. It did not adopt either of these methods. It did not tax certain legacies and exempt others. It predicated the tax on the value of the estate computed as prescribed by the law. To carry out the intent of not taxing small estates, the tax is imposed only on estates having a value for taxation purposes exceeding a certain amount. Congress might have fixed a percentage of the actual value as the value for the purpose of the tax, as, for instance, 60%, and this would have been the value for tax purposes of the entire estate and property transferred. It might have provided that in computing the value of the net estate one-half the amount bequeathed to charity should be deducted. Congress provided that the property should be appraised at its real value and that from this actual value there should be deducted the arbitrary amount of $50,000.00 and certain other amounts, and the remainder thus obtained should be "for the purposes of the tax the value of the net estate." (Sec. 403.) This served to reduce the taxable value of the net estate but did not reduce the net estate or exempt any of the net estate. A person making a will is advised by the act that, to the extent of the value of the property he may give to charity, no tax will be charged against his estate.

We quote the following from page 12 of brief of counsel for petitioners:

> "The clearest and most graphic description of this tax is that given by the Supreme Court of Oregon in **Re Estate of Inman**, 101 Ore., 182, 16 A. L. R., 675, 199 Pac., 615, wherein it is said:
>
> 'Every estate within the embrace of the federal statute must pass through the federal government's toll gate before it can be divided, and the several portions into which it is divided sent onward to their respective destinations. Figuratively speaking, this toll gate is erected and maintained **at the place where the net estate of the decedent is assembled** preparatory to its division and distribution; but, **before the net estate** can be divided and pass through the toll gate, a toll must be paid to the national government. **This toll is fixed and collected upon the assembled net estate considered as a unit**, without regard to the different portions into which it is to be divided, and without regard to the different roads over which the several portions are to go after passing through the toll gate, and without regard to the destination of the different portions.'"

We agree that this is a most graphic description of the tax. It is a most graphic description of the "net estate." It describes it as all the estate in the hands of the executor after the payment of costs and debts. None of the estate then in the hands of the executor escapes passage through the government toll gate. There the executor must assemble all the estate left after paying the costs and debts. Then the revenue commissioner values this entire net estate according to the method and with the deductions prescribed by the statute. None of the estate can be transferred by the executor to any

beneficiary, whether a charitable institution or other beneficiary, until the tax is paid. It is "fixed and collected upon the assembled net estate considered as a unit." When the executor pays the tax upon the entire net estate as valued by the revenue commissioner, all may pass through, the executor may transfer all the legacies and devises. The specific legacies will pass through and be transferred without any deductions. Beneficiaries of specific devises and legacies will receive them in full. The residuary legatees will receive only what the executor has left after he has transferred the specific devises and legacies, and after he has paid the tax. The net estate comprises every devise and legacy.

In the consideration of this act, it must be observed that **value** is carefully and consistently fixed as the basis for applying the percentages in computing the tax. This value is to be found in the method prescribed by the act. The deductions are from the **value** of the gross estate and when the deductions are made, the **value, for the purpose of the tax,** is found.

Section 401 provides "A tax equal to the sum of the following percentages of the value of the net estate (determined as provided in Section 403) is hereby imposed upon the transfer of the net estate," following with the progressive percentages.

Section 402 provides, "That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property," and then follow provisions for including the property transferred in contemplation of death, etc.

Section 403 provides "That for the purpose of the tax, the value of the net estate shall be determined (a) in the case of a resident, by deducting from the value of the gross estate (1) such **amounts** for funeral expenses, administration expenses, claims against the estate," etc., "(2) an **amount** equal to the value at the time of the decedent's death of any property" of the decedent upon which the tax has been paid within five years. "(3) the **amount** of all bequests, legacies, devises, or gifts to or for the use of the United States, any state, territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes," etc., "(4) an exemption of $50,000."

This value after making the deductions from the value of the gross estate is the value of the estate transferred, upon which the tax is computed as provided in Section 401. The amount of property transferred is not reduced. All property passing to all the beneficiaries is still the estate transferred. The act provides for computing the percentages on a value of that property, for the purpose of the tax, less than its actual value, by making the deductions from the value of the gross estate, and this is the tax the executor is required to pay out of the estate.

Section 404 directs the executor to make a return "setting forth, (a) the value of the gross estate of the decedent at the time of his death, or in case of a nonresident, of that part of his gross estate situated in the United States; (b) the deductions allowed under Section

403; (c) the value of the net estate of the decedent as defined in Section 403; (d) the tax paid or payable thereon."

Section 407 provides that the executor shall pay the tax.

Section 408 provides that if the tax is not paid within 180 days, the collector shall commence proceedings "to subject the property of the decedent to be sold" and no provision is made for the exemption from such sale of any property to be transferred.

This section further provides:

> "If the tax, or any part thereof, is paid by or collected out of that part of the estate passing to or in the possession of any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed, or by just and equitable contribution by the persons whose interests in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate, or whose interest is subject to equal or prior liability for the payment of taxes, debts or other charges against the estate, it being the purpose and intent of this title that so far as is practicable and unless otherwise directed by the will of the decedent, the tax shall be paid out of the estate before its distribution."

The prior liability of residuary legatees is an instance of the prior liability recognized in this section.

The provision that the tax shall be paid out of the estate before its distribution leaves no doubt that this is an estate tax, not a legacy tax, charged against the estate in the hands of the executor and not against the

beneficiaries, and the burden, like that of all other charges against the estate, must rest on the residuary legatees.

Section 409 provides:

> "That unless the tax is sooner paid in full, it shall be a lien for ten years **upon the gross estate of the decedent, except that such part of the gross estate as is used for the payment of charges against the estate and expenses of its administration,** allowed by any court having jurisdiction thereof, shall be divested of such lien."

The property used for the payment of charges against the estate is the only part of the gross estate divested of the lien. No legacy or devise is thus exempted or divested of the lien. The lien is upon all the remainder of the estate, which includes all property transferred or passing to beneficiaries. It includes property bequeathed to charitable institutions, the property upon which the tax has been paid within the last five years, and the $50,000.00 worth of property deducted in determining the tax value.

The act would not have created a lien for the payment of the tax on any property intended to be exempted from the payment of the tax or from any part of the tax. Imposing a lien upon property for the payment of the tax by one provision and exempting the same property from liability for the tax by another provision is an inconsistency too absurd to be implied and only tolerated if clearly expressed. That the act divested the property needed for the charges and expenses from the lien and did not divest the property upon which the tax was paid

within five years, the property given to charity, and other property to the value of $50,000.00, discloses the intent not to divest such property of the lien and not to free it from liability for payment of the tax. If it had been the purpose of Congress to "exempt" charitable institutions or to "exempt" the property bequeathed to them, they would have been added to the exception of the part of the estate used for expenses and charges in Section 409.

Counsel for petitioners refer to "non-exempt classes," implying that these residuary legatees are exempt classes (p. 22), and then say that if a part of the residuary bequests are to non-exempt classes, both exempt and non-exempt classes must bear their proportionate shares of the tax and that therefore there is "a reduction of tax that would inure for the benefit of those for whom Congress had provided no exemption." The tax paid by the executor was $31,000.00. Suppose the estate left, after paying charges and the specific legacies, were $62,000.00 and the will had bequeathed the residue of the estate to a charitable institution and to an individual share and share alike. According to the contention of counsel for the petitioners, half of the $62,000.00 would be taken from the individual beneficiary to pay the $31,000.00 tax and so the individual would get nothing and the other $31,000.00 would go to the charitable institution, while the will says that each residuary legatee shall have one-half the residue.

Counsel for petitioners contend that Congress intended to exempt the property given to charitable institutions

from contributing to the payment of any portion of the tax. If it were intended that the property given to charitable institutions under Subdivision 3 of Section 403 should be exempt, it must follow that the beneficiary of property mentioned in Subdivision 2 of Section 403 would likewise be exempt from the tax.

Assume that A died possessed of a million dollars worth of property which consisted, in part, of a country home valued at $200,000.00, and which he received from his father's estate within five years prior to his death and on which the estate tax was paid. Assume further that A devised this $200,000.00 estate to his son B and that the rest of the property was specifically devised to other children. We maintain that in arriving at the value of the net estate, $200,000.00 would be deducted under Subdivision 2 of Section 403, and the federal estate tax would then ultimately be borne pro rata by all the devisees and legatees.

Under opposing counsel's contention, the son who received the $200,000.00 estate could not be called upon to have his property contribute in any wise to the tax. We think it plain this contention is erroneous. If this contention is erroneous in regard to property under Subdivision 2 of Section 403, then opposing counsel's contention is likewise erroneous under Subdivision 3 of Section 403.

Counsel for petitioners say that the amendment of 1918 was to relieve petitioners from this tax and that it was to inure to the benefit of those whose bequests were to be deducted, but contend that upon the theory of the Su-

preme Court of Ohio this deduction can benefit none and that it becomes meaningless except to reduce governmental revenue which was not its design. These residuary legatees are benefited to the extent of the reduction of the tax under the 1918 amendment. Under the former law, the percentages would have been applied to the value of the entire estate after deducting charges against the estate and $50,000.00, whereas the amendment applies the percentages to the value found after making the further deductions under the 1918 amendment.

If the entire estate had been bequeathed to these charitable institutions, they would have benefited to a much greater extent, but when it is known that the residue of this estate is approximately $300,000.00, it is easily seen how these beneficiaries derive a very substantial benefit under the amendment of 1918.

In conclusion we submit: (1) that the federal law makes no assessment of the tax as between the beneficiaries under the will, and the question as between them is to be determined by the will and the state law as construed by the state court; (2) the residue of the estate is to be found in the same manner as under the act before the amendment of 1918, after deducting all charges including the charge of this tax and deducting the specific legacies and devises, and (3) the net estate is the entire estate and property assembled for transfer to all the beneficiaries and not merely the estate and property passing to those whose shares are not included in paragraphs (2), (3), (4) of Section 403.

Respectfully submitted,

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